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IN THE

Supreme Court of the United States

OCTOBER TERM, 196[illegible]

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,
Appellant

v.

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY AND LAKE SUPERIOR AND ISHPEMING RAILROAD COMPANY, *Appellees*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

REPLY TO MOTION TO AFFIRM

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TWENTIETH CENTURY PRESS, INC., CHICAGO 6

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Two points in the Motion to Affirm require this brief reply.

1. At pages 6-7 of the Motion, appellees purport to derive from *Alabama & V. Ry. Co.* v. *Jackson & E. Ry. Co.*, 271 U.S. 244, the proposition that the Interstate Commerce Act precludes I.C.C. from adjudicating the status of track, whether "switch track" or "extension." The *Alabama* case, of course, decided no such question, but instead illustrates the error below, for neither appellees nor the Court below dispute the Commission's findings (J.St.[1] 45) that the tracks involved here connect the *main line* of these two Class I railroads, and that they have never before been interconnected at any point (*ibid*). These facts alone

1. We so identify our Jurisdictional Statement herein.

establish the error of the decision below, for this Court held squarely in *Alabama & V. Ry. Co.* v. *Jackson & E. Ry. Co.*, 271 U.S. 244 at 250, that:

> the establishment of junctions between the main lines of independent carriers is commonly connected with the establishment of through routes and the interchange of car services, and is often but a step toward the joint use of tracks. Over all of these matters the Commission has exclusive jurisdiction.

2. Finally, the Motion to Affirm (pp. 9-10) obliterates the distinction long established by this Court between cases where the District Courts are called upon to compel carriers to obtain I.C.C. authority to construct new track[2] with cases such as this, involving judicial review of I.C.C. orders permitting or forbidding construction of new rail.[3] The issue thus persists—does a Federal District Court, in reviewing a Commission order, retain the same full measure of independent discretion to strike its own balance among these factors as it would have possessed in an original judicial proceeding?

Since the fundamental issue facing the Commission in such cases is economic in character, it involves more than an inventory of physical factors. Will the territory support the new operation, or will the particular construction, regardless of its size or cost, result in wasted resources and impair earnings of the national railway system as a whole, with injuries resulting to other carriers and, ultimately, to the public?

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2. E.g., *Texas & Pacific Ry. Co.* v. *Gulf, C. & SF. Ry. Co.*, 270 U.S. 266.

3. *State of Illinois* v. *United States*, 213 F.Supp. 83 (N.D. Ill. 1962), affirmed 373 U.S. 378; *State of Georgia* v. *United States*, 156 F. Supp. 711 (N.D.Ga. 1957), affirmed 356 U.S. 273; *Public Service Comm'n. of New York* v. *United States*, 56 F. Supp. 351 (S.D. N.Y. 1944), affirmed 323 U.S. 675.

While the District Court dealt with the inventory—with the length of the line, population of the territory near the interconnection, schedules, station buildings and telegraph lines (J.St. 23-24), these issues are far from dispositive of the Commission's economic judgments. Reaching beyond these basic facts, I.C.C. found (J.St. 65-66) that this area was one of "light traffic density (J.St. 65)," producing only "low rated (J.St. 65)" commodities of a nature that "in order for any carrier to handle such traffic profitably, it must be handled in large quantities (J.St. 65)." Concluding that the new operation did in fact divert traffic from North Western and Soo Line (J.St. 65) it held J.St. 65-66) that:

> Such diversion in this area of light traffic density cannot help but be reflected in the earnings of the lines sustaining the loss and might well affect their ability to continue to provide as adequate a service in the area as was previously provided. Existing carriers providing an adequate service should be protected and strengthened against wasteful competition and duplication of services, since to weaken carriers by such methods would result in ultimate injury to the shipping public. *Texas & N.O. R. Co.* v. *Northside Belt Ry. Co.*, 276 U.S. 475.
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> Aside from the effect which use of the connection has had, or may have, upon established carriers in the area, it has resulted in a new competitive situation between carriers having connection with the Ishpeming so that the traffic is now subject to direct competition for its routing, and the Ishpeming, as the controlled subsidiary of Cleveland Cliffs, is in the position of being able to play one connection against another, thereby making it possible to provide Cleveland Cliffs a preference by way of concessions in divisions, car supply, or in other ways. Although there is nothing of record to indicate that any of such abuses have occurred, it would not be consistent with the provisions of the act or with the public interest to grant a certificate of public convenience and necessity for a connec-

tion making them possible. Moreover, it is our opinion that the benefits which would inure to the two supporting shippers do not offset the detriment to established carriers in the area and to the general public that might result from operation of the connection.

That these issues as well as the inventory of land, line and parts are crucial to the question of economic significance is revealed by the *Texas & Pacific* case,[4] relied upon by both the Commission (J.St. 47-50) and the lower court (J.St. 19-20). For there this Court, looking well beyond the length of line and industrial makeup of the area (270 U.S. 266 at 275), and the presence or absence of stations, schedules and telegraph service (270 U.S. 266 at 276) explained (270 U.S. 266 at 277-278) that:

> A truer guide to the meaning of the terms extension and industrial track, as used in paragraphs 18 to 22, is furnished by the context and by the relation of the specific provisions here in question to the railroad policy introduced by Transportation Act, 1920. By that measure, Congress undertook to develop and maintain, for the people of the United States, an adequate railway system. It recognized that preservation of the earning capacity, and conservation of the financial resources, of individual carriers is a matter of national concern; that the property employed must be permitted to earn a reasonable return; that the building of unnecessary lines involves a waste of resources and that the burden of this waste may fall upon the public; that competition between carriers may result in harm to the public as well as in benefit; and that when a railroad inflicts injury upon its rival, it may be the public which ultimately bears the loss. See *Railroad Commission* v. *Chicago, Burlington & Quincy R.R. Co.*, 257 U.S. 563; *The New England Divisions Case*, 261 U.S. 184; *The Chicago Junction Case*, 264 U.S. 258; *Railroad Com-*

4. *Texas & Pacific Ry. Co.* v. *Gulf, C.&S.F. Ry. Co.*, 270 U.S. 266.

mission v. *Southern Pacific Co.*, 264 U.S. 331. The Act sought, among other things, to avert such losses.

Going beyond length of line and immediate investment, then, this Court squarely holds that the impact of the proposed construction upon traffic and revenues of existing carriers is an essential element of the economic equation inherent in Section 1(18). This, we submit, the Commission properly analyzed in affirming its duty to control such construction and in finding it inimical to the public interest guarded by that agency. Likewise, we submit that the District Court blurred this issue into obscurity by ignoring entirely the Commission's analysis and re-examining the jurisdictional issue *de novo* upon the mechanical basis recited in its opinion (J.St. 23-24).

By failing to distinguish its more limited role in reviewing the Commission's findings here from the findings which would have been required of it in an initial proceeding to enjoin the construction pending I.C.C. approval, the court erred by intruding without warrant into the administrative domain, under the teaching of *United States* v. *Drum*, 368 U.S. 370, 385-386;[5] *State of Illinois* v. *United States*, 213 F.

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5. Contrary to Appellee's contention (Motion to Affirm, p. 14), *Drum* involved the jurisdictional question of whether the subject carriers conducted for-hire operations, subject to I.C.C. control, or exempt private carriage. On the issue of the scope of judicial review of this jurisdictional finding this court held, 368 U.S. at 376 and 385-386:

> Because the Commission's resolution of the issue does not seem to us to violate the coherence of the body of administrative and judicial precedents so far developed in this area, we are of the opinion that there was no occasion for the District Court to disturb the conclusion reached by the Commission.
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> We think that such conclusions were well within the range of the responsibility Congress assigned to the Commission. The District Court explicitly recognized the propriety of the Com-

Supp. 83 (N.D. Ill. 1962), affirmed 373 U.S. 378 and *Public Service Comm'n. of New York* v. *United States*, 56 F. Supp. 351 (S.D. N.Y. 1944), affirmed 323 U.S. 675.

The court below thus clearly substituted its judgment for that of the Commission upon an issue no longer open for *de novo* determination. This action requires reversal in the interest of achieving appropriate interaction between the federal courts and the regulatory agencies.

Respectfully submitted,

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mission's inquiring into the substance of the arrangements. Yet the court's conclusion that "what is involved here is private carriage on the part of the Company, rather than transportation for-hire by the owner-operators," 133 F.Supp., at 281, rests on no articulated premise other than that Oklahoma did have control. If the court intended to hold that the Commission is confined to the "control" test, we think it clearly in error in view of the statutory objectives which we have set forth above. If, on the other hand, the court meant to substitute its judgment for the Commission's on the question of substance, we think that, on this record, it indulged in an unwarranted incursion into the administrative domain.

Reversed.